IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 710.

A. G. SPALDING & BROS.,
Plaintiff in Error,

vs.

WILLIAM H. EDWARDS, Collector of Internal Revenue for the Second District of New York,
Defendant in Error.

In Error to the District Court of the United States for the Southern District of New York.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The brief for defendant in error entirely ignores the only question at issue, viz., were the articles taxed while in course of exportation?

If the articles sold by the plaintiff in error were taxed while in course of exportation, such taxation was contrary to and in violation of Art. 1, Sec. 9, par. 5 of the constitution which provides that no

tax or duty shall be laid on articles exported from any State. (*William E. Peck & Co. vs. John Z. Lowe, Jr., Collector*, 247 U. S. 165; *Turpin vs. Burgess*, 117 U. S. 504).

In the first brief filed for the plaintiff in error (on pages 12 to 17) reference is made to decisions by this Court defining that which constitutes course of exportation which decisions hold that goods sold to an exporter in the United States to supply the demand of a foreign country were in course of exportation at the time of delivery to a carrier for transportation to the exporter at the port of export. (*Railroad Commission vs. Texas & P. R. Co.*, 229 U. S. 336; *Texas & N. O. R. Co. vs. Sabine Tram Co.*, 227 U. S. 111). There is, therefore, no question but that the articles sold by the plaintiff in error were taxed while in course of exportation.

The brief for the defendant in error quotes (on pages 16-18) the provisions of Section 602 of the Revenue Act of 1917, which provides:

> "That upon all articles enumerated in subdivisions (a), (b), (e), (f), (g), (h), (i), or (j), of section six hundred, which on the day this Act is passed are held and intended for sale by any person, corporation, partnership, or association, other than (1) a retailer who is not also a wholesaler, or (2) the manufacturer, producer, or importer thereof, there shall be levied, assessed, collected, and paid a tax equivalent to one-half the tax imposed by each such subdivision upon the sale of the articles therein enumerated. This tax shall

> be paid by the person, corporation, partnership, or association so holding such articles."

The apparent object of quoting this Section is to lead to the inference that the tax was assessed upon such articles in the possession of export houses, purchased by them for account of buyers in foreign countries prior to the time the Act took effect. Any such inference, however, would be entirely incorrect. The fact is that the Commissioner of Internal Revenue ruled, on January 2, 1919, that such articles in possession of the exporters were not taxable under Section 602. In this ruling the Commissioner said:

> "Articles so acquired by an export commission merchant and remaining in his custody on October 4, 1917, merely for the purpose of shipment to the foreign buyer for whose account and under whose specific instructions the articles were purchased, are not subject to floor tax on 'articles held or intended for sale' as the purpose is not to sell but to ship to a consignee who already has specific interest in those articles."

These articles were, therefore, exempt from tax under decisions of this Court because in course of exportation at the time such tax applied.

On page 17 of the brief for defendant in error learned counsel are also incorrect in stating that Congress

> "intended also to tax such articles that were still in the hands of the manufacturer, producer or importer on the effective date of the Act."

As a matter of fact such articles were explicitly exempted from tax under Section 602; and under Section 600 the articles were not taxed until they had been sold by the manufacturer, producer or importer.

On page 36 of the brief filed by defendant in error learned counsel say:

> "While I have followed my learned opponents in citing and quoting cases which did not arise under the export tax clause, but under other sections of the Constitution, particularly the Commerce Clause, yet I respectfully submit that cases under the Commerce Clause, which attempt to draw the boundary line between the respective powers of the Federal Government and of the States with reference to interstate and intrastate commerce, are not, in all respects, analogous to cases under the export tax clause of the Constitution. *They relate to different subjects and rest upon different bases of power.* The export tax exemption is not a part of the Commerce Clause as such. It is a part of the Taxing Clause of the Constitution and a restriction thereon, and the power of the Federal Government, under the taxing clause, is different and broader than the power of regulation under the Commerce Clause."

It is difficult to understand the purpose of the distinction which is thus attempted to be drawn between the power of the Federal Government with respect to the taxation of foreign commerce, and the power of the States with respect to the regulation of interstate commerce, and the bearing of any such attempted distinction upon the case of the plaintiff in error.

Can it be possible that the learned counsel mean to imply that the identical articles under identical circumstances can be in course of exportation when a law enacted by a State is under consideration, and yet not in course of exportation when a law enacted by Congress is under consideration?

As shown in the first brief for plaintiff in error (on page 26) the Attorney General, in an opinion dealing with Section 500 of the Revenue Act of 1917, which imposed a tax on the amount charged for the transportation of property within the United States, held that such tax could not be applied to the transportation of articles sold to exporters at the seaboard because such articles were in course of exportation at the time of delivery to the carrier by the vendors. This opinion was supported by the identical decisions of this Court which learned counsel now insist may not be cited by the plaintiff in error to establish the fact that the tax in question was laid on the articles while in course of exportation. It would, therefore, appear that when the Attorney General is construing a Federal tax law he may apply the definition given

by this Court to "course of exportation" in decisions relating to the interstate commerce clause of the Constitution, but that such decisions can have no application when cited by the taxpayer.

The extended reference by counsel in the brief for the defendant in error (on pages 8-16) to the debate in the Constitutional Convention upon the adoption of the clause forbidding a tax on articles exported, is instructive; but this Court has reviewed the history and purpose of this clause, and clearly determined its application, and has repeatedly said that a tax, either by a State or by Congress, can not be applied to articles in course of exportation. The decisions of this Court show clearly that when articles are placed in course of exportation the act of exportation has commenced; and hence the taxation of articles in course of exportation and the taxation of the exportation of such articles is one and the same thing. The act of delivery of the articles by plaintiff in error to the exporter was therefore as much a part of the act of exportation as the steps taken by the exporter to accomplish delivery of the articles to the buyers in the foreign countries.

On page 34 of brief for defendant in error counsel cite from the decision of this Court in *Waring vs. Mayor* (8 Wall. 110), but this has no bearing upon the case of the plaintiff in error. If in *Waring's case* he had sold the salt to an exporter in Mobile for export, or to a dealer there for transportation to another State, the tax upon the sale

would clearly have been invalid under the decisions. Waring's sale was in intrastate commerce.

The frequent and extended reference to *Coe vs. Errol* (116 U. S. 517), show that learned counsel for defendant in error have failed to note the difference between the imposition of a tax by a State before commerce commences and a Federal tax which can not be applied under the law until after the commerce had commenced.

Respctfully submitted,

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